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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GROUNDTECH, INC., et al.,

Plaintiffs, Cross-Defendants and  
Respondents,

v.

TIM JAY CUTHERS et al.,

Defendants, Cross-Complainants  
and Appellants.

B203918

(Los Angeles County  
Super. Ct. No. BC339684)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

Edward M. Picozzi for Defendants, Cross-Complainants and Appellants.

Raisin & Kavcioglu, Armenak Kavcioglu and Aren Kavcioglu for Plaintiffs,  
Cross-Defendants and Respondents.

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In this construction dispute, property owners Agust Agustsson and Tomas Agustsson, along with Tomas Agustsson's company Groundtech, Inc., sued subcontractor Tim Cuthers and his company Cuthers Construction, Inc. (collectively "Cuthers") for, among other things, breach of contract. Cuthers cross-complained, alleging breach of contract as well as a claim for "work, labor and materials furnished."

The jury found that all parties had breached the contract. In determining damages, the jury awarded contract damages to Groundtech only. The jury awarded Cuthers damages under his quantum meruit<sup>1</sup> claim. The net result was that Groundtech owed Cuthers approximately \$22,000. That all changed, however, when the trial court struck Cuthers's quantum meruit award and entered judgment notwithstanding the verdict. The trial court determined that, because the jury found a contract existed, Cuthers could not succeed on the quantum meruit claim. As a result, Cuthers now owes Groundtech approximately \$31,000 in contract damages. Cuthers appealed.

We conclude substantial evidence supports both the jury's finding of a contract as well as the jury's award of \$0 damages on Cuthers's breach of contract claim. We also conclude that, as a matter of law, Cuthers may not recover on his quantum meruit claim. Accordingly, we affirm.

## **Background**

Agust Agustsson and Tomas Agustsson decided to construct a building on property they own in Los Angeles (the "project"). Tomas Agustsson's company Groundtech, Inc. was the general contractor for the project. Cuthers submitted a "proposal & contract" to the Agustssons, bidding on the concrete work for the project. In response, Groundtech sent a "letter of commitment" to Cuthers, in which Groundtech indicated that Cuthers had been "selected to perform the concrete work" for the project.

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<sup>1</sup> We use the term quantum meruit to refer to Cuthers's claim for "work, labor and materials furnished" (as stated in his cross-complaint), which is referred to as "work, labor and services rendered" on the verdict form.

Agust Agustsson signed the letter of commitment as “Project Manager.” Tim Cuthers testified that he began work on the project because his bid had been accepted.

As it turned out, the concrete work for the project was repeatedly delayed. The parties dispute who caused the delays or even why they occurred. Cuthers presented evidence that, in light of the Agustssons’ and Groundtech’s errors, Cuthers had to perform work outside the scope of the contract. The Agustssons and Groundtech presented evidence indicating that Cuthers caused most of the delays and problems with the project.

After working on the project for close to two months, Cuthers submitted a “payment application” to Groundtech. Even though Cuthers, admittedly, had not completed some of the work listed on the payment application, Cuthers described the work as 100% complete and sought payment as if the work had been done. Neither the Agustssons nor Groundtech paid that application. Eventually, Cuthers walked off the job and Groundtech hired a different subcontractor to complete the concrete work. Subsequently, Cuthers submitted an invoice (which was much different in form than the earlier payment application) requesting payment for “work completed based on time and material.” The Agustssons and Groundtech did not pay the invoice either.

At trial, the Agustssons and Groundtech presented evidence to support their claim for breach of contract damages, including, for example, increased costs due to the delays. Cuthers chose to focus on his quantum meruit claim, presenting evidence of the “reasonable value” of the work he had done on the project. For this purpose, Cuthers relied heavily on the invoice he had prepared after walking off the job. Cuthers did not separate his alleged contract damages from his alleged noncontract damages.

Before the jury had been instructed, the Agustssons and Groundtech moved for nonsuit on Cuthers’s quantum meruit claim. They argued that, because a contract existed covering Cuthers’s work on the project, Cuthers could not proceed on his quantum meruit claim. They also argued that, to the extent the quantum meruit claim was valid, Cuthers improperly lumped all his damages together without separating alleged contract damages from noncontract damages. The trial court denied the motion without prejudice.

The jury returned a verdict finding that all parties had breached the contract. Thus, the jury impliedly found that the parties had entered into a contract for the project's concrete work. Although Cuthers sued for breach of contract and included his breach of contract claim on the verdict form, during trial Cuthers repeatedly disputed that a contract existed between the parties. And, if any contract existed, Cuthers had insisted it was between Cuthers and the Agustssons only. On the other hand, the Agustssons and Groundtech insisted the contract was between Groundtech and Cuthers. The jury resolved these factual disputes and found a contract existed between them all.

The jury awarded Groundtech \$31,357 in contract damages. Although the jury awarded \$0 damages on Cuthers's breach of contract claim, it awarded Cuthers \$53,363 on his quantum meruit claim. Judgment was entered, with Cuthers prevailing against Groundtech in the net amount of \$22,006.

Following judgment, the Agustssons and Groundtech moved for judgment notwithstanding the verdict. Their arguments were substantially the same as those made in their motion for nonsuit. In particular, they argued that, as a matter of law, Cuthers could not recover on his quantum meruit claim because, as the jury had found, a contract existed covering Cuthers's work on the project. They also argued that the quantum meruit claim failed in any event because Cuthers improperly lumped all his alleged damages together, without separating contract damages from noncontract damages. The trial court granted the motion and entered judgment in favor of the Agustssons and Groundtech.

Cuthers then moved for judgment notwithstanding the verdict. Cuthers argued the evidence did not support an award of \$0 damages on his contract claim. The trial court denied Cuthers's motion.

Cuthers appealed from the judgment as well as the trial court's denial of his motion for judgment notwithstanding the verdict.<sup>2</sup>

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<sup>2</sup> The Notice of Appeal indicates that defendant and cross-complainant American Contractors Indemnity Company ("American Contractors") also appealed from the judgment and the trial court's denial of Cuthers's motion for judgment notwithstanding

## Discussion

### I. Contract

Cuthers claims the jury incorrectly found that a contract existed between the parties. In reviewing this issue, we do not, as Cuthers asserts, determine whether substantial evidence supports his view that there was no contract. Rather, we review the record to determine whether substantial evidence (even if contradicted) supports the jury's finding that there was a contract.<sup>3</sup> (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Perhaps in light of his misunderstanding of the standard of review on appeal, Cuthers presented a one-sided and, therefore, inadequate statement of facts. Indeed, in his briefs to this Court, Cuthers admits that he does not “provide” a complete statement of facts. According to Cuthers, we “must disregard all evidence produced by [the Agustssons and Groundtech] on this issue [of contract formation] at the time of trial.” When attacking the substantiality of the evidence, however, the appellant must present a fair statement of facts, including all material evidence submitted on the particular point. If the appellant fails to do so, the alleged error is deemed waived. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d at p. 881.) In light of Cuthers's admittedly incomplete statement of facts, he has waived his challenge to the jury's finding that a contract existed between the parties.

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the verdict. However, neither the verdict form nor the judgment mentioned American Contractors, and the parties do not discuss the company in their briefs on appeal. Because American Contractors is not the subject of any issue on appeal, we do not reference American Contractors in this opinion.

<sup>3</sup> Cuthers seems to confuse the jury's finding of a contract (a factual issue) with the trial court's reliance on that finding to conclude that Cuthers could not recover on his quantum meruit claim (a legal issue). As to the jury's factual findings, we review the record to determine whether substantial evidence supports those findings. As to the trial court's legal rulings, we review those de novo.

Even if we consider this argument, however, it is clear that substantial evidence supports the jury's finding that a contract existed. As the Agustssons and Groundtech point out in their brief, the jury heard testimony and reviewed documents supporting the existence of a contract. For example, trial exhibits six (Cuthers's bid) and eight (Groundtech's letter of commitment) tend to show the formation of a contract. In addition, Mr. Cuthers testified that he began work on the project because his proposal had been accepted. Similarly, Agust Agustsson testified that Cuthers's proposal was accepted. Although conflicting evidence was presented, substantial evidence supports the jury's finding that a contract existed between Cuthers and Groundtech and between Cuthers and the Agustssons (a contract Cuthers alleged in his cross-complaint).

The jury instructions add further support to the jury's finding of a contract. The trial court instructed the jury that "Cuthers admits that a contract existed but denies that he breached it." Cuthers does not appear to have objected to or otherwise questioned the accuracy or appropriateness of this instruction. The Agustssons and Groundtech state that Cuthers did not object to this instruction. Thus, not only does substantial evidence support the jury's finding, the jury was instructed that a contract existed.

## **II. Quantum Meruit**

Cuthers argues the trial court improperly determined that Cuthers could not recover on his quantum meruit claim. We must determine whether, as a matter of law under the facts determined by the jury, Cuthers may recover on his quantum meruit claim. We review this question of law de novo. (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 718-19.) Because, as explained above, substantial evidence supports the jury's finding that a contract exists, we agree with the trial court and conclude that Cuthers cannot recover on his quantum meruit claim.

Quantum meruit is an equitable doctrine. When no contract exists governing the payment for services or materials provided, quantum meruit permits recovery for the reasonable value of those services or materials. When parties bargain for and agree upon a contract price, however, that contract price represents the parties' expectations under

the contract. In such cases, quantum meruit plays no role. ““The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability. . . .”” (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.)

Here, the jury found a contract existed. Under the contract, Cuthers was to complete the concrete work for the project. Although it was not clear to what extent Cuthers performed work in addition to or outside the scope of the contract, there were no change orders authorizing any such work. Indeed, allowing a contractor to recover in quantum meruit as opposed to the contract price would encourage contractors to bid low in the hopes of later recovering in quantum meruit due to, for example, cost overruns by the contractor or changes that occur as the project progresses. (See *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 240.) Because, as the jury found, a contract existed between the parties for the work at issue, Cuthers may not recover on his quantum meruit claim. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, *supra*, 41 Cal.App.4th at p. 1419.)

### **III. Rescission**

Cuthers argues that he rescinded the contract and, as a result, can recover on his quantum meruit claim. The Agustssons and Groundtech assert that Cuthers makes this argument for the first time on appeal. Cuthers does not indicate otherwise. Although Cuthers argues he was not required to plead rescission, whether true or not, he was still required to have raised the issue in the trial court before raising it on appeal. It is not our role to determine questions of fact in the first instance, such as whether the evidence supports a finding that Cuthers rescinded the contract. Accordingly, we do not address this argument, raised for the first time on appeal. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

#### IV. Damages

Cuthers argues the evidence does not support the jury's verdict of \$0 damages on his breach of contract claim. We review the jury's determination of damages under the substantial evidence standard. (*Johnson v. Cayman Development Co.* (1980) 108 Cal.App.3d 977, 983.)

Again, however, Cuthers presented a one-sided and, therefore, inadequate statement of facts on this point. In his briefs on appeal, he failed to include evidence that tends to support the jury's verdict of \$0 damages on his breach of contract claim. Therefore, Cuthers has waived this alleged error. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

Even if we consider this argument, however, the evidence supports the jury's finding of \$0 damages on Cuthers's breach of contract claim. As explained above, the jury found that a contract existed governing the work Cuthers was to perform on the project. Accordingly, Cuthers's only viable claim for damages would have been based on the contract. Despite proceeding on both his breach of contract claim and quantum meruit claim, however, Cuthers chose to present his case as one "primarily" for quantum meruit. In his Opening Brief, he admits that, "[f]rom the very beginning, Cuthers has treated this as a non-contractual, quantum meruit case." He made similar representations before the trial court.

Perhaps based on his admitted case strategy, Cuthers did not use a contract measure of damages at trial. Rather, he presented evidence showing the reasonable value of his alleged damages. For example, Vicki Cuthers, who is responsible for billing and payroll at Cuthers Construction, testified as to Cuthers's alleged damages. She testified as to the reasonable value of the services and materials Cuthers provided for the project. In particular, she explained the invoice Cuthers prepared following the breakdown of the parties' relationship. Ms. Cuthers testified that the invoice reflected the hourly rate of its employees while working on the project as well as the actual costs of materials used on the project. Tim Cuthers testified about the same invoice, explaining that it reflected the actual costs of the project and used Cuthers's noncontract rates. Mr. Cuthers also



testified the invoice was prepared because “the job took too long to perform.” The invoice itself states: “This invoice is for work completed based on time and material. Including overages on cleaning of footing, chipping footings, rebar changes, and daily cleanup from dogs.”

Noticeably absent from the record are any instances where Cuthers tied the alleged damages to the Agustssons’ or Groundtech’s breach of contract. There is no evidence, for example, of what percentage of the contract price the Agustssons or Groundtech might owe Cuthers or, as Cuthers admits, of any lost profits Cuthers might have suffered.

In addition, counsel for Cuthers consistently argued the “reasonable value” theory to the jury. For example, at the start of the trial, counsel explained that Cuthers would “be asking for what’s fair and reasonable” and is “only asking to get reimbursed for the value of the benefit that we gave to them. That will be our case.” Similarly, in closing, counsel described the “central issue of the case” as follows: “We worked, and we haven’t been paid. Here’s what we spent. Here’s what we want to get paid. And it’s fair.” And again, in his Opening Brief on appeal, counsel asserts “Cuthers did not invoice Respondents for the balance of the contract price or for their profit, i.e. contract damages. Instead, Cuthers invoiced Respondents for the value of services provided to date along with materials provided to date, i.e. a quantum meruit measure of damages.”

Even the jury instructions steered the jury away from awarding damages on Cuthers’s breach of contract claim. The trial court instructed the jury on what *Groundtech* had to prove in order to recover damages for breach of contract. The court instructed that if the jury found Cuthers had breached the contract, it must then decide how to compensate “Groundtech for the harm caused by the breach. . . . [¶] The purpose of such damages is to put Groundtech in as good a position as if it would have been if Cuthers had performed as promised.” The jury was not similarly instructed on Cuthers’s breach of contract claim. In fact, immediately after instructing the jury on Groundtech’s claim for contract damages, the trial court instructed the jury on Cuthers’s quantum meruit claim.

Not surprisingly, then, having only been presented with the quantum meruit measure of damages for Cuthers's claim, the jury awarded Cuthers quantum meruit damages and not contract damages. It is not disputed that Cuthers performed work under the contract. It also seems clear that Cuthers performed a certain amount of work not necessarily contemplated by the contract. What remains unclear, however, is the extent to which Cuthers's claimed damages are contract damages. The jury decided this factual issue against Cuthers and awarded Cuthers nothing under the contract. Cuthers had his chance at trial to present the jury with a contract measure of damages. He chose not to do so. He cannot complain now of his trial strategy and his failure of proof on contract damages. (See *Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 572-573, 575.)

### **Disposition**

The judgment is affirmed.  
NOT TO BE PUBLISHED.

TUCKER, J.\*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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\* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.